STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Saad P.J., and Sawyer and Hoekstra, JJ.)

JULIE A. PUCCI,

Plaintiff-Appellant,

v

CHIEF JUDGE MARK W. SOMERS, In his individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee.
_____/

Supreme Court No. 153893
Court of Appeals No. 325052
Wayne County Circuit Court
LC No. 13-014644-CZ

BRIEF ON APPEAL OF AMICUS CURIAE JUDGE MARK W. SOMERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is submitted in response to the Court's invitation. Your *amicus* is the principal defendant against whom the judgment underlying this action was entered. He also continues to serve as an administrative officer of the 19th District Court as its Chief Judge Pro Tem by virtue of his re-election in 2008 and 2012 by the citizens of the City of Dearborn and his appointment as Chief Judge Pro Tem by the Honorable Sam Salamey, Chief Judge of the 19th District Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

MCLA 691.1408 specifically authorizes a state agency to voluntarily choose to indemnify an officer of that agency and to "pay, settle or compromise" a claim, including a judgment entered thereon, where the damages arise out of the officer's action(s) taken "while in the course of employment and while acting within the scope of his or her authority." There is no dispute that the district courts of this state are governmental agencies within the meaning of the indemnification statute. MCL 691.1401.[1] There is no dispute that the termination of Plaintiff-Appellant's employment was the result of Judge Somers exercising the specific authority granted to him by this Court as a duly appointed chief judge to "hire, discipline or discharge [court] personnel" MCR 8.110(C)(3) *see also:* MCL 600.8271.[2]

This Court has previously decided that a lower court may voluntarily accept a mediated settlement of an intentional tort claim arising out of the alleged misconduct of a judicial officer where that action is brought directly against the court, and that the local funding unit is responsible for paying the voluntarily accepted settlement. *Cameron v Monroe County Probate Court*, 457 Mich 423 (1998). *Ergo*, it follows that alleged "misconduct" does not preclude a court from voluntarily indemnifying an officer or from paying, compromising or settling a judgment entered against that officer where the underlying action(s) may be found to constitute gross negligence or "a reckless indifference to a plaintiff's rights".[3]

The court's discretionary authority as a state agency is expressly granted by statute for actions brought directly against the individual officer without any distinction or limitation as to whether that action is against the officer in his or her "individual" or "official" capacity and is of the same force whether the claim is settled "before or after the commencement of a civil action". MCL 691.1408.

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1) *See:* Brief on Appeal of Garnishee Defendant-Appellee Nineteenth District Court, p. 10

2) This Court would be entirely within its statutory and administrative oversight authority to exclusively retain unto itself the granting or denial of indemnity to officers, employees and volunteers within the judicial branch of government through an appropriate directive, court rule or administrative order . . . but to date, it has not.

3) Whether actions constituting actual malice are beyond the power of a State agency to indemnify is a question beyond the necessary inquiry in this case, although the conduct of Judge Seitz underlying the *Cameron* case might well support that conclusion. *In Re Seitz*, 441 Mich 517 (1993). While not at issue here, it may be further noted that MCL 691.1408 goes so far as to authorize the discretionary payment for representation of an officer or employee in criminal proceedings.

Moreover, this Court has previously decided that the agency's statutory authority to settle or compromise a claim arising out of the intentionally tortious conduct of a judicial officer(s) may be exercised by a single individual, the duly designated administrator of a court, without seeking or obtaining further authority or consent of a local funding unit and with a resultant obligation upon the funding unit to pay the judgment. *Cameron*, supra.

The indemnification policy underlying these garnishment proceedings was adopted within the statutory authority granted directly by the Michigan legislature to all State agencies and the administrative authority granted by this Court through its appointment of a Chief Judge. It is enforceable against the garnishee defendant and, thereby, against the funding unit.

The authority Garnishee-Defendant-Appellee would seek to derogate and diminish in this case is not that of a lone Chief Judge, it is none other than the power granted to this very Supreme Court and each of its designated representatives through the plainly expressed will of the Michigan legislature as well as to every other State agency and their duly authorized representatives.

STATEMENT OF FACTS

A. The Tenure and Appointment of Judge Somers as Chief Judge of the 19th District Court and Court Reorganization

Judge Somers was first elected to the 19th District Court for the six year term commencing January 1, 2003, and re-elected for the terms commencing January 1, 2009, and the current term commencing January 1, 2013. He was appointed Chief Judge of the 19th District Court by order of this Court for the two-year term commencing January 1, 2006, for a second two-year term commencing January 1, 2008, and a third two-year term commencing January 1, 2010.[4]

The most senior judge of the 19th District Court, the Honorable Judge William Hultgren, was passed over for the appointment(s) as he was involved in a romantic domestic partnership with his

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4) The latter two appointments occurred during the pendency of the underlying federal litigation. Judge Somers has served as Chief Judge Pro Tem since 2015 by appointment of Chief Judge Salamey.

fiance, the deputy court administrator, Plaintiff-Appellant, Julie A. Pucci.[5]

Prior to his appointment as Chief Judge, Judge Somers complained through SCAO to the Supreme Court of plans by his predecessor Chief Judge, the Honorable Leo Foran,[6] to place Plaintiff-Appellant in the position of court administrator. This Court, through its Chief Justice, directed that Plaintiff-Appellant could not be advanced to any position above that which she held prior to the commencement of her romantic domestic partnership with Judge Hultgren. [Exhibit O, Appx. 185a].

In October, 2006, after consultation with SCAO Region 1 Administrator Deborah Green, Chief Judge Somers announced a reorganization of court administration whereby Appellant's position was eliminated, the then current court administrator was to be returned to her prior position as Clerk of the Court and a new court administrator was to be hired. [Exhibit O, Appx. 147a-148a][7]

B. Pre-Filing Communications and Consultation with the Funding Unit

Prior to the filing of litigation, Plaintiff-Appellant, through counsel, demanded $34,065.50 in full satisfaction and settlement of her potential claims, and then $53,275.38. Responses to these demands were authored by Chief Judge Somers and vetted through consultation with the City of Dearborn legal department. [Exhibit O, Appx. pp.181a -188a. March 10, 2008, memorandum to City Council]. Litigation ensued.

C. The underlying Federal Civil Rights Case.

Judge Somers concurs in the statement of facts by Appellant with respect to the underlying federal court action with the following addition(s) which are given to refute the irrelevant and unsupported inference by Appellee's counsel that Judge Somers acted wholly without effort to consult

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5) Subsequent to the trial and exhaustion of the appellate process in the underlying federal litigation Plaintiff-Appellant and Judge Hultgren married.

6) Judge Foran of the 20th District Court, a long-time close personal friend of Judge Hultgren and Appellant, was appointed Chief Judge of the 19th District Court upon the retirement of the Honorable Virginia Sobotka in 2006.

7) This was the identical organizational structure that had been proposed by Judge Foran prior to this Court's directive disallowing Plaintiff-Appellant's advancement. Judge Somers ultimately hired a (male) U.S. Army veteran with 20+ years' experience administering JAG offices. At trial, Judge Somers prevailed on Plaintiff-Appellant's claim of gender discrimination.

with the local funding unit and to illustrate the often unpredictable and unanticipated pitfalls of civil litigation that give real-life meaning to SCAO's admonition that courts should consider liability insurance and indemnification policies as part of their risk management planning incident to the conduct of the business of the court. [Exhibit Y, Appx. 457a-459a].

Appellant's complaint was amended three (3) times over the course of the litigation that lasted over four years prior to trial, included an interlocutory appeal to the 6th Circuit Court of Appeals and a post judgment return to that Court with a final decision denying relief from the judgment on February 13, 2015. [Exhibit N, Appx. 114a-136a; Exhibit Y, Appx. 457a-459a].[8]

In an early effort to resolve the claim, on March 5, 2008, the parties to the underlying action participated in a seven (7) hour facilitation process under the guidance of retired Circuit Court Judge Peter Houk. During that process, Judge Somers was in communication with the City of Dearborn's legal department which provided assistance in obtaining quotes for annuities that would be utilized to effectuate the settlement and, ultimately, a proposed settlement was agreed upon with the proviso that Judge Somers would seek approval of the Dearborn City Council. The settlement was estimated to cost a total of $113,050.00.[9] [Exhibit O, Appx. pp.181a -188a, March 10, 2008, memorandum to City Council]. The City Council rejected that settlement opportunity.

D. Adoption of the 19th District Court's Indemnification Policy

The City of Dearborn has a long standing practice of indemnifying and holding harmless its officers and employees in civil litigation. Consequently, there was no reason for Judge Somers to believe that the funding unit would deny the same to the officers and employees of the 19th District

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8) Pucci v Nineteenth Dist. Court, 596 Fed. Appx. 460 (6th Cir. Mich. Feb. 13, 2015. The final amendment adding Plaintiff-Appellant's First Amendment retaliation claim was allowed by the court seven (7) months after the close of discovery, based upon an affidavit signed by Judge William Hultgren in response to a motion for summary disposition wherein he attested to his having told Judge Somers that plaintiff had complained about him (Judge Somers) to SCAO (a claim denied by Judge Somers) and after plaintiff's counsel's (non-judicial) admission/representations that no retaliation complaint would be filed due lack of such evidence. Pucci v. Nineteenth Dist. Court, 596 Fed. Appx. 460,467 (6th Cir. 2015)

9) Although not appearing in either appendix on this appeal, the parties should acknowledge that the cost of the annuity was revised upward at the time of meeting with the City Council from the estimated $62,000 to an actual quote of $86,614.61 obtained by the City Legal department, thereby increasing the cost of the proposed settlement to $137,664.61.

Court for whose funding they are statutorily responsible.[10] In fact, it is a matter of public record that two years *after* the trial of the underlying claims in this case, in May of 2013, the City of Dearborn paid a $300,000 settlement in a Federal lawsuit brought against the City, its mayor, its police chief, and 17 police officers wherein they were all named *in both their official and individual capacities. Acts 17 Apologetics et. al. v. City of Dearborn, et. al.* Case No. 2:11-cv-10700, U.S. Dist. Ct. E.D. Mich.

In October of 2008, after the underlying claim in this case arose and after rejecting a facilitated settlement of Appellant's claims, the 19th District Court procured – and the City of Dearborn began paying for – the annual premiums for judicial liability insurance, thereby signaling a mutual and continuing recognition and acceptance of responsibility for claims against judges of the District Court, including coverage for punitive damages. [Appx. p.167a-179a; Appx. p.152b].

On May 9, 2011, a meeting was convened between Judge Somers, Assistant Attorneys General assigned to his representation, members of the funding unit's legal department, and the mayor. With trial of the underlying case scheduled to commence on June 22, 2011, it was at this meeting, *for the first time,* that Judge Somers and the Assistant AG's were informed that City administration was taking a position that the funding unit would not be liable for any adverse judgment that might be rendered. Judge Somers' May 11, 2008, memorandum setting forth the basis of his opinion that they were "incorrectly and ill-advisedly equating 11th Amendment immunity issues with State court indemnity issues" was generated in response to that revelation [Appx. 142b-144b]. In an effort to impress upon the funding unit's mayor and corporation counsel that they were exposing the funding unit to the risks of trial, Judge Somers' accompanying email stated that "(w)hile I feel confident in the strength of the defense in all three (3) pending cases, I believe it only fair and proper to put this issue on the table now."[11] They refused to discuss settlement.

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10) The funding unit had consistently appropriated funds used for the defense of its judges. O'Neill v Nineteenth Dist. Court Judge William C. Hultgren (Mich. Ct. App. Jan. 25, 2002) unpublished. In re Runco, 463 Mich. 517 (2001); In re Hultgren, 482 Mich. 358 (2008).

11) The referenced email was provided to the Appellee during the discovery process in the lower court proceedings.

Judge Somers consulted with SCAO Region 1 Administrator, Deborah Green prior to executing the official written indemnification policy and codifying in writing protections for all court administrative personnel that the funding unit had voluntarily afforded (and continued to afford) to its own officers and employees, supra. [Appx. 195b] Administrator Green advised Judge Somers that ". . . it wasn't really a SCAO issue, but . . . [she] *didn't see anything wrong with what he was writing.*" (emphasis added) [Appx. 195b].

The indemnification policy was explicitly reaffirmed by successor Chief Judge Wygonik [Exhibit O, Appx. 164a-165a] and current Chief Judge Salamey accepts its core principle that a judge be indemnified for claims where their actions are taken while acting on "matters" pertaining to the court's business. Judicial liability insurance continues to be provided. [Appx. 146B, 148b]

STANDARD OF REVIEW

Judge Mark W. Somers concurs with the statement of the standard of review set for in the Plaintiff-Appellant's brief.

ARGUMENT

A. A District Court Chief Judge Has Authority to Adopt an Employee Indemnification Policy on Behalf of the District Court Pursuant to MCL 691.1408(1) and MCR 8.110(C)

The Michigan legislature has specifically authorized State agencies to settle, compromise and pay claims or judgments against an individual officer or employee without further approval or consent of a "funding unit" and this Court has delegated those decisions to the Chief Judges of the lower courts. Statute, case law and the Michigan Court Rules are in full accord. MCL 691.1408(1); *Cameron v. Monroe County Probate Court*, 457 Mich 423 (1998); *2nd District Court v. Hillsdale County*, 423 Mich 705 (1985); MCR 8.110. Because the State legislature specifically authorized the discretionary indemnification, there is no constitutionally based "funding dispute" as argued by Appellee. *Warda v. City Council*, 472 Mich 326 (2005).

The principles of statutory interpretation are most recently reaffirmed in this Court's opinion in *Covenant Medical Center, Inc, v . State Farm Mutual Automobile Insurance Company, D*ocket No. 152758 decided May 25, 2017; 895 N.W.2d 490:

> "The role of this Court in interpreting statutory language is to "ascertain the legislative intent that may reasonably be inferred from the words in a statute." "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent. When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."

Appellee admits the critical failure of its position in the very first page of argument when it acknowledges that "The plain language of the statute" establishes (1) that indemnification is discretionary on the part of a State agency and (2) that "there is no dispute that the district courts in this state are governmental agencies within the meaning of the indemnification statute."[12] *Warda v City Council,* 472 Mich 326,340 (2005).[13] *Warda* incontrovertibly establishes that a State agency's discretionary indemnification decision is without limitation or standards by which it may be reviewed "*absent a constitutional violation or other illegality.*" Id. At 340,341.

Hanging by this thread, and with no argument to be made as to "illegality" Appellee hastens past *Warda*, past any further examination of the statute, proceeding posthaste to opine that a chief judge cannot make "a unilateral decision to indemnify" and then launches into protracted argument on the separation of powers and reservation of the right to appropriate funds in the legislature.[14]

Appellee proffers that the policy was adopted ". . . without the approval of either the City of Dearborn, which serves as the Court's funding unit, *or any higher court.*" [emphasis added][15] If this is a concession that "approval" by the funding unit is not required where the action has been authorized by "a higher court" then, by all means, there will be no disagreement on the point from this quarter – a

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12) Garnishee-Defendant-Appellee's brief, page 10, citing MCL 691.1401(a)&(e)
13) Garnishee-Defendant-Appellee's brief, pages 9-10
14) Garnishee-Defendant-Appellee's brief, pages 10 -16
15) Garnishee-Defendant-Appellee's brief, page 4

matter that will be revisited momentarily.

Whether intended as an out-right concession or whether instead Appellee is hedging its argument(s) against the exposure of their weakness through closer scrutiny, it cannot credibly refute the conclusion that a plain reading of the statute commands – i.e. there is nothing in the language of MCL 691.1408 to suggest that a governmental agency must consult with or obtain *further or additional* authority nor so much as the advice or opinion of a separate branch of government for the exercise of an agency's discretionary authority – already expressly granted in that statute – to indemnify one of its officers or employees.

Simply put, there is no funding dispute to be had here as: "*Where the Legislature has by statute granted authority or created a duty, the local funding unit may not refuse to provide adequate funding to fulfill the function.*" *2nd District Court v. Hillsdale County,* 423 Mich 705, 721 (1985).

Appellee nonetheless turns to *Wilson v. Beebe,* 770 F2d 578 (CA 6, 1985) for a declaration against "unilateral" decision-making under the statute arguing that only a State "agency" is empowered to make the decision – as if agencies are not managed by actual human beings with authority granted to act on their behalf. It may first be observed that Beebe was a state trooper (thereby a law enforcement officer employed by an agency of the executive branch of government) and there is no indication in the Court's opinion or otherwise that the decision to defend and indemnify him individually was submitted for approval to the State Legislature – i.e. the "funding unit" for the State Police. Second, there is no indication in the opinion as to the internal procedure that was employed within the State agency itself in making the indemnification decision. Third, as noted at the beginning of this argument, regardless of how the decision may have been made in *Beebe*, the statute itself does not set forth any specific requirements or guidance as to how a State agency is to make an indemnification decision. Once again, it is left to the agency's discretion. *Warda v City Council,* 472 Mich 326,340 (2005). And, for the judiciary, the discretion lies with this Court or its duly appointed designee.

Case in point. In *Cameron v. Monroe County Probate Court,* 457 Mich 423 (1998) this Court affirmed that a lower court's decision to voluntarily settle litigation may properly be exercised by a single individual appointed by the Michigan Supreme Court. The underlying litigation in *Cameron* was settled by acceptance of a mediation evaluation by the State Court Administrator who "*was acting as the Special Administrator for the Probate Court*" and who "*accepted the mediation evaluation on behalf of the probate court, apparently against the wishes of the county.*" [Id. at 428, fn 1]. Under that authority, Judge Somers could have accepted the facilitated settlement in 2008 against the wishes of the funding unit at a time when the claims against the court and for "official capacity" liability remained, thereby extinguishing all claims against him in his individual capacity (just as the City of Dearborn did to the benefit of its mayor, police chief and 17 police officers in the Acts 17 case in 2013.)[17] In hindsight it should have been done here over the funding unit's objection.

Finally your *amicus* concurs in Appellant's analysis of MCR 8.110 as the expression of this Court's delegation of authority to the Chief Judges of the lower courts as it is in full accord with the result in this Court's ruling in *Cameron*, supra.

B. A Chief Judge May Adopt a Policy that Indemnifies Employees for Liability Incurred in Their Individual Capacity

The latter two questions posed by this Court turn at least initially upon a common use and interpretation of the terms "course of employment" and "scope of authority" under Public Act 170 of 1964.

Appellee attempts to create an exclusion of "individual capacity" claims from the voluntary indemnity statute as necessarily falling outside of the "scope of authority" and "course of employment". Appellee's first problem is that there are no words in the statute with respect to "official capacity" *vs.* "individual capacity" claims. It simply allows for the payment, settlement and compromise of a

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17) *Acts 17 Apologetics et. al. v. City of Dearborn, et. al.* Case No. 2:11-cv-10700, United States District Court, Eastern District of Michigan.

"claim", including a judgment entered against the officer or employee, and for a State agency to "indemnify the officer, employee or volunteer" MCL 691.1408(1).

Act 170 of 1964 of the Michigan legislature sets forth a three-part scheme regarding (1) absolute immunity, MCL 691.1407(5); (2) qualified immunity, MCL 691.1407(2); and (3) voluntary indemnification of officers and employees of governmental agencies for tort liability where they are not otherwise cloaked with immunity, MCL 691.1408. This case does not involve a claim of absolute immunity but rather of administrative actions taken within the course of managing the internal business matters or operations of a court. As part of a single statutory scheme, the language of MCL 691.1407(2) is critical to a clear and consistent understanding of the phrase "scope of authority" as used in the succeeding section, MCL 691.1408.

Under the provisions of MCL 691.1407(2) immunity from tort liability is afforded to the individual ". . . if all of the following are met:

> (a) the officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage." [emphasis added]

"Gross negligence" is, in turn, defined as ". . . *conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results*." MCL 691.1407(8)(a).

A plain reading of this language directs a straightforward and dispositive conclusion: under this legislative scheme an individual may act "*within the scope of* [their] *authority*" while, at the very same time, they are acting ". . . *so reckless as to demonstrate a substantial lack of concern for whether an injury results*." [18] Why else would these be separate elements for establishing qualified immunity?

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18) This same definition is employed in standard Michigan Civil Jury Instruction 14.10. Moreover, as discussed in the next section it is your a*micus'* position that the statutory use of these terms is consistent with common law. However, in the event this Court be persuaded otherwise, deference must be given to the express words of the legislature where it is shown there is a legislative intent to alter the meaning of the term(s). *Ford Motor co. v City of Woodhaven*, 475 Mich 425, 439 (2006).

By its express terms, the indemnity statute does not exclude acts constituting gross negligence. MCL 691.1408. Had the legislature intended to do so, they would have followed their own example set forth in the preceding section [MCL 691.1407(2)(c)] and it is not for the courts to insert such a provision. *Covenant Medical Center, Inc, v. State Farm Mutual Automobile Insurance Company,* Docket No. 152758 decided May 25, 2017; 895 N.W.2d 490

How, when and by whom then is the grant of indemnity to be decided? MCL 691.1408 specifically authorizes settlement, compromise and payment of a claim "*before or after the commencement of a civil action*" and, although authorizing payment of a judgment, it makes no mention of requiring an adjudication upon the merits. It should, therefore, be noted that determination of whether the actions at issue were taken "*in the course of employment*" or "*within the scope of authority*" are not issues reserved exclusively for litigation and determination by a trier of fact where an agency's voluntary indemnification of an officer or employee is at issue.

This Court's decision in *Cameron v. Monroe County Probate Court,* 457 Mich 423 (1998) is entirely and consistently in accord and, as previously discussed, then "Chief" Judge Somers could have elected to accept the facilitated settlement in 2008 without seeking the advice or consent of the local funding unit. This point alone should forestall any debate concerning the validity and propriety of the indemnity policy at issue and its unfettered application to this case.

Nonetheless, your *amicus* encourages the Court to examine and give consideration to the jury instructions and verdict rendered in the underlying case on the issue as it will most assuredly observe their support for the arguments laid out in this brief.

Appellant prevailed at trial on two counts: (1) due process and (2) First Amendment retaliation. In addition, she was awarded punitive damages on each of those two counts. In its brief, Appellee ignores the law as given to the jurors, and would instead (mis)direct this Court's attention to the closing arguments of the attorneys [Exhibit B, Appx. 15B – 120b]. And for good reason. The Federal District

Court's instructions to the jury do not support a presumption or finding here beyond gross negligence on the part of the Chief Judge – a fact that places the verdict plainly within a State agency's statutory authority to indemnify its officer or employee.[18]

Consistent with *Cleveland Bd. Of Educ. v. Loudermill,* 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2D 494 (1985), instructions to the jury regarding procedural due process did not include any element(s) respecting wrongful intent or motivation. They read:

> "First, she had a property interest in her continued employment.
>
> Second, she was deprived of that interest by a person acting under color of state law.
>
> Third, she was not afforded timely and adequate process under law.
>
> Fourth, that the Plaintiff suffered damages.
>
> And fifth, that the acts of the Defendant were a proximate cause of damages sustained by the Plaintiff." [Endnote, p.19, Trial Transcript, page 937].

Regarding Appellant's First Amendment retaliation claim the elements are well-settled and, similarly, contain no element of wrongful intent or motivation:

> "A plaintiff alleging First Amendment retaliation" must prove that 1) he engaged in protected conduct, 2) the defendant took an adverse action that would deter a person of ordinary firmness from continuing to engage in that conduct, and 3) the adverse action was taken at least in part because of the exercise of the protected conduct." *Pucci v. Nineteenth Dist. Court*, 628 F.3rd 752, 767 (6th Cir. 2010).

In keeping with this standard, instructions to the jury regarding First Amendment retaliation did require that protected speech was "a" factor in the termination of her employment,[19] but also included a legal directive that ". . . *it is not necessary that the Defendant specifically intended to violate the Plaintiff's First Amendment rights* …'[Endnote, pp. 23,26, Trial Transcript, pages 941,944].

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18) To reiterate, your *amicus* does not concede that civil judgments rendered for acts beyond gross negligence are beyond a State agency's right to voluntarily indemnify. That question is simply not necessary to the decision in this case. *See* fn. 3.

19) "First, that the Plaintiff engaged in protected activity; that is, activity that was protected by the first Amendment. Second, that the Plaintiff [sic] took some adverse action against the Plaintiff that would deter a person of ordinary firmness from continuing to engage in the exercise of activity protected by the First Amendment; Third, that the Plaintiff's protected activity was a substantial or motivating factor in the Defendant's decision to take adverse action against the Plaintiff. Fourth, that the Defendant's actions were under color – cover – excuse me – that the Defendant's actions were under color of the authority of state law. And fifth, that the Defendant's action were a proximate or legal cause of the damages sustained by the Plaintiff." [Endnote, p. 23, Trial Transcript, page 941].

Even, and perhaps most revealingly, when the question of punitive damages is introduced, the standard under a 42 U.S. Code § 1983 Federal claim is that the actor engaged in the conduct with "*evil motive or his reckless indifference to the rights of others*" (emphasis added) *Smith v. Wade,* 461 U.S. 30, 46; 103 S. Ct. 1625,1635; 75 L. Ed. 2D 632,646 (1983). "*Reckless indifference to the rights of others*" is indistinguishable from the definition of gross negligence set forth in MCL 691.1407(8)(a) as "*conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.*"

> "Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence." *Smith v. Wade,* 461 U.S. 30,46; 103 S. Ct. 1625, 75 L. Ed. 2D 632 (1983).

The Federal District Court's instructions to the jury were completely in keeping with those standards:

> "You may award punitive damages only if you find that the Plaintiff has proved by a preponderance of the evidence that the Defendant intentionally engaged in the unlawful actions with malice *or with reckless indifference to the Plaintiff's rights.*" (emphasis added) [Endnote, p.30, Trial Transcript, page 950].

Given the alternatives set forth in the jury instruction, it is impossible to second guess or assign to the jury's verdict in this case a finding of actual malice as opposed to "reckless indifference". It is not within the province of the Court or the parties to engage in speculation as to which of those alternatives the jurors, individually or collectively, may have assigned their decision. The only requirement under the Federal Rules of Civil Procedure under which the case was tried is that (absent a stipulation to the contrary) the verdict be must be unanimous. FRCP 48(b). Consistent with the court rule, the Federal District trial court's general unanimity instruction to the jury did not require that the jurors be in agreement as to a single theory of Judge Somers' motivation in terminating the Appellant's employment when reaching their verdict. [Exhibit B, Appx. 110b].

In illustration of the point – and in rebuttal to Appellee's characterizations and reliance upon the

attorneys' closing arguments in the underlying case – it is perfectly plausible and consistent with the evidence at trial that the jury viewed Plaintiff-Appellant as the innocent third-party victim of a deep-seeded animus between her fiance, Judge Hultgren, and then Chief Judge Somers, manifested at least in part on the heals of the decision to terminate her employment in the process of court reorganization, by Judge Somers' filing of a request for investigation of Judge Hultgren with the Judicial Tenure Commission.[20] Moreover, her termination as the "odd-person-out" in a court reorganization mirroring that which was previously proposed by Judge Foran allows for a finding that the reorganization itself was a valid reason, i.e. "a" proximate cause for her termination, while the decision to choose her as opposed to another supervisory employee may have been due to an "awareness" on the part of Judge Somers of her protected activity and that it was "at least part of [his] reason for taking the action" [Endnote, Trial Transcript, pages 941; 944] – i.e. also "a" proximate cause of her termination.[21]

Again, although a "*reckless indifference to the Plaintiff's rights*" in the course of these events falls outside the scope of conduct for which qualified immunity is available as "*conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results,*" MCL 1407(2), it remains squarely within a state agency's statutory authority to voluntarily choose to indemnify an officer or employee, including payment of a judgment entered against that individual. MCL 691.1408.

C. Chief Judge Somers' Conduct in Terminating Plaintiff Occurred "While in the Course of Employment and While Acting Within the Scope of His Authority"

The analysis in the preceding section is of equal application to the questions of "course of employment" and "scope of authority" as they relate to the particulars of the case at bar. Still further, even if this Court is persuaded to look beyond the plain language of the statute, the only precedential

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20) In Re Hultgren, 482 Mich. 358 (2008). See also: *Pucci v. Nineteenth Dist. Court,* 596 Fed. Appx. 460,462 (6th Cir. 2015) for discussion of the evidence by the 6th Circuit Court of Appeals in upholding the jury's verdict.

21) Under one of her theories of the case, Plaintiff-Appellant asserted during the underlying litigation that she should have had "bumping rights" to retain employment with the 19th District Court over the court clerk who had approximately one month less seniority.

authority cited by Appellee is *Martin v. Jones*, 302 Mich 355 (1942) and it simply fails to deliver on Appellee's argument that the actions of Judge Somers as a duly appointed Chief Judge were taken outside of the course of employment within the meaning of the statute.

First, although *Martin* does indeed state that an employee's conduct lies outside the course of employment where he "*steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own.*"[24] this 1942 case obviously did not deal with interpretation of the legislation at issue here enacted in 1964.

Second, *Martin* acknowledges precedent wherein the act of a servant is deemed to be within the course of employment if it either "*might in some way have been held to be promoting his master's business by his action, or else it was part of the servant's duties . . .*" (emphasis added) Id. at 358. Again, use of the disjunctive "*or*" plainly denotes a choice[25] between "promoting the master's business" and being engaged in an activity or use of an instrumentality (in that case carrying a gun) that was within those the servant had been entrusted with *regardless of whether the servant exercised their discretion in a manner that would actually promote the master's business.*

Third, by its own terms, *Martin* relies upon *Anderson v. Schust Co.,* 262 Mich 236 (1933), quoting "*The rule is that for a positive wrong by a servant beyond the scope the master's business intentionally or recklessly done, the master cannot be held liable.*" (emphasis added) Id. at 240. Although factually dissimilar from the case at bar (cases involving the shooting of a gas station customer during an argument and automobile owner liability both decided years before the enactment of the statute here in question) the more careful reading of *Martin* (above) and the cited language from *Anderson* actually support a finding that Judge Somers' actions were taken within the course of employment as it is plainly within the scope of the business of a District Court (through its Chief Judge) to "hire, discipline or discharge [court] personnel" MCR 8.110(C)(3) *see also:* MCL 600.8271. The

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24) Garnishee-Defendant-Appellee Nineteenth District Court's Brief on Appeal, page 23

25) *See: Covenant Medical Center, Inc, v . State Farm Mutual Automobile Insurance Company,* Docket No. 152758 decided May 25, 2017; 895 N.W.2d 490

instrumentality in *Martin* was a physical object, a gun that the employee decided to take into his own hands. The instrumentality here was the authority of a Chief Judge over personnel decisions specifically placed in his hands by this Court.[24] A reckless indifference to the Appellant's rights in the use of that instrumentality does not take the actions outside the course of employment or the scope of authority.

CONCLUSION

Appellee makes a lot of noise about the 'never before' scenario of this case. Your *amicus* submits that he may well be the only Chief Judge in the history of Michigan courts who has been dealt a situation in which there was an attempt to promote the romantic domestic partner of a judge to the highest non-judicial administrative position in the court in that judge serves. The underlying litigation may well be a case study in how not to respond to that situation and with the benefit of hindsight it should have been settled at the earliest reasonable opportunity, with or without the advice and consent of the funding unit. If it may be said that there was unwise administration of the court in meeting this unique challenge, then it may equally be said that it was compounded by unwise decision making by the funding unit. This however, is not a summons to point fingers or cast aspersions between a funding unit, a court and a Chief Judge. Diplomacy failed prior to, during and after a trial where Plaintiff-Appellant prevailed in the minds of the jurors by a preponderance of the evidence and whose judgment our jurisprudence commands inviolate respect.

At this juncture, the decision of the State legislature to invest all State agencies with the discretionary grant of indemnification to their officers and employees through their duly elected or

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24) This seemingly obvious conclusion is supported by the Federal trial court. Upon reviewing this very question, the Federal District Court held: "The plaintiff complains of Judge Somers's decision to eliminate her position and fire her. Under Michigan law, the chief judge is authorized to coordinate the court's finances, including the duty to "supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel." Mich. Ct. R. 8.110(C)(3)(d). **Judge Somers acted pursuant to this authority when he terminated the plaintiff.**" (emphasis added) *Pucci v.Nineteenth Dist. Court*, 565 F. Supp. 2d 792, (E.D. Mich. July 10, 2008), reversed in part, affirmed in part, *Pucci v. Nineteenth Dist. Court,* 628 F.3rd 752, 767 (6th Cir. 2010).

appointed designees should be equally held beyond reproach. The authority to voluntarily indemnify officers and employees for claims – including judgments entered against them individually – has been specifically conferred upon State agencies and, consequently, there is no cognizable constitutional "funding dispute" in this case.

Accordingly, your a*micus* respectfully requests that the decision of the Court of Appeals be reversed and that judgment be entered affirming the Garnishee-Defendant's responsibility for payment of the underlying judgment. Your a*micus* further requests that this Court give due consideration and deliberation toward exercising its authority by Administrative Order to give specific guidance to the Chief Judges of this State on matters pertaining to the defense and indemnification of all administrative court personnel as it did when it decided *2nd District Court v. Hillsdale County,* 423 Mich 705 (1985) and issued Administrative Order 1985-6 regarding funding disputes and local funding units.

Respectfully submitted,

By: /s/ Mark W. Somers
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August 11, 2017

ENDNOTE – Federal District Court Jury Instructions

The official transcription of the Federal District Court's instructions to the jury on the elements of her claims, including the claim for punitive damages appear at pages 937 through 951 of the Federal Trial Court Transcript and are appended hereto, constituting pages 18 through 33 of this brief.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Julie A. Pucci,

Plaintiff,

-v-

Case No. 07-10631

Chief Judge Mark W. Somers, individually and in his official capacity,

Defendants.
_____/

JURY TRIAL - VOLUME FIVE

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
June 29, 2011

APPEARANCES:

FOR THE PLAINTIFF: JOEL SKLAR
SANFORD PLOTKIN
615 Griswold
Suite 1116
Detroit, Michigan 48226

FOR THE DEFENDANT: MICHAEL KING
CHRISTINA GROSSI
Michigan Department of Attorney General
525 West Ottawa
Fifth Floor
P.O. Box 30736
Lansing, Michigan 48909

any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

In order to prevail on her first claim alleging a procedural due process violation, the Plaintiff, Julie A. Pucci, must prove all of the following elements by a preponderance of the evidence:

First, she had a property interest in her continued employment.

Second, she was deprived of that interest by a person acting under color of state law.

Third, she was not afforded timely and adequate process under law.

Fourth, that the Plaintiff suffered damages.

And fifth, that the acts of the Defendant were a proximate cause of damages sustained by the Plaintiff.

With respect to the first element, Michigan law usually provides that an employment arrangement is terminable at will, unless the employer agrees otherwise or the employer's policies provide otherwise.

Terminable at will means that the employment relationship may be terminated by either party at any time, without -- with or without cause, for any reason, or for no reason whatsoever.

However, the law also recognizes that a public employee may have a property interest in her continued

employment under certain circumstances, including where the employee may be fired only for cause under the language of the employment contract or the organization's operating rules and policies.

To determine whether the Plaintiff -- the Plaintiff's employment agreement allowed for termination for cause only, you should consider the express terms and conditions of any employment contract. A term or condition is express if the employer and employee have agreed with one another orally or in writing that the employment will not be terminated except in accordance with that term or condition.

Next, the implied terms and conditions of the contract. A term or condition is implied if the employer has caused the employee to have a legitimate expectation that her employment will not be terminated except in accordance with that term or condition.

The employee's expectations must arise from the employer's oral or written policy statements or the employer's actions as fairly understood.

The Plaintiff must believe that her employment could not be terminated except in accordance with that term or condition and the Plaintiff's expectations must have been reasonable under all of the circumstances.

If you find that the Plaintiff's employment

agreement provided for termination for cause only, you should find that she had a protected property interest in her job.

With respect to the second element, the parties have agreed that the Defendant, Mark Somers, acted under color of state law or custom and you may accept that fact as having been proven.

With respect to the third element, the Plaintiff must prove that she did not receive an appropriate notice of the loss of her property interest and an opportunity to be heard.

The Plaintiff receives adequate process if she is given notice of the planned termination, an explanation of the employer's evidence, and a hearing at which she is afforded the opportunity to respond before she is terminated.

The hearing does not need to be elaborate or follow any prescribed format, but it must amount to a meaningful opportunity to invoke the discretion of the decision maker before the termination decision is finally made and takes effect.

The Plaintiff has the burden of proving each and every element of her claim by a preponderance of the evidence. If you find that the Plaintiff has proved each of these elements by a preponderance of the evidence, you must return a verdict for the Plaintiff.

If you find that the Plaintiff has not proved any one of the elements by a preponderance of the evidence, you must return a verdict for the Defendant.

In her second claim, the Plaintiff alleges that the Defendant terminated her employment unlawfully in retaliation for her exercise of rights under the First Amendment to the Constitution.

Under the First Amendment to the Constitution, every citizen has a right to speak out on matters of public concern. However, a citizen may exercise this right only as an individual, not as a public employee or pursuant to her official duties.

The term, matter of public concern, refers to speech that relates to political, social or other concerns of the community. That type of speech may call attention to the functioning of the government, misconduct of public employees or officials, or breaches of the public trust.

In addition to the citizen's right to speak out on matters of public concern, the First Amendment protects citizens from being penalized or retaliated against by state or local government -- by a state or local government actor for exercising that right.

Title 42, United States Code, Section 1983, provides that a person may sue for an award of damages against anyone who, under color of any law or custom, any

state law or custom, intentionally violated or violates the Plaintiff's rights under the United States Constitution.

In order to prevail on her second claim, the Plaintiff, Julie A. Pucci, must prove all of the following elements by a preponderance of the evidence.

First, that the Plaintiff engaged in protected activity; that is, activity that was protected by the First Amendment.

Second, that the Plaintiff took some adverse action against the Plaintiff that would deter a person of ordinary firmness from continuing to engage in the exercise of activity protected by the First Amendment.

Third, that the Plaintiff's protected activity was a substantial or motivating factor in the Defendant's decision to take adverse action against the Plaintiff.

Fourth, that the Defendant's actions were under color -- cover -- excuse me -- that the Defendant's actions were under color of the authority of state law.

And fifth, that the Defendant's actions were a proximate or legal cause of the damages sustained by the Plaintiff.

The Plaintiff has the burden of proving each and every element of her claim by a preponderance of evidence. If you find that the Plaintiff has proved each of these elements by a preponderance of evidence, you must return a

verdict for the Plaintiff.

If you find that the Plaintiff has not proved any one of the elements by a preponderance of the evidence, you must return a verdict for the Defendant.

As to the first element, the First Amendment to the Constitution protects the right of public employees to speak out as citizens on matters of public concern as long as the Plaintiff is not speaking pursuant to her official duties, and the Plaintiff's interest as a citizen in commenting on such matters outweighs the Defendant's interest in efficiently performing his public services.

You must determine whether the Plaintiff, as a public employee, was speaking as a citizen on the one hand, or as part of her official duties on the other.

To make that determination, consider the following factors: The Plaintiff's official job duties; whether the Plaintiff had an official responsibility to monitor the conduct about which she complains; whether the Plaintiff's supervisor assigned the Plaintiff the task of monitoring the conduct about which she complains; the terms of any formal or informal job description of the Plaintiff's position with the 19th District Court; whether the Plaintiff's complaint was made as part of carrying out an official duty falling within her responsibility as Deputy Court Administrator.

If you find that the Plaintiff's complaint on a

matter of public concern was made as part of her official duties, then you must find that the Plaintiff has not established the first element of her First Amendment retaliation claim.

If you find that the Plaintiff's complaint on a matter of public concern was made as a citizen and not part of her official duties, then the Court will determine whether the Plaintiff's interest as a citizen in commenting on such matters outweighed the Defendant's interest in efficiently performing his public services.

However, you will be required to answer two questions in the verdict form that relate to the speech based on the evidence in the case.

First, did the Plaintiff's act of lodging her complaint about the Defendant's use of religious references in the performance of his judicial duties cause or could it have caused disharmony in the workplace at the 19th District Court.

And the second question, did the Plaintiff's act of lodging the said complaint impair the Plaintiff's ability to perform her duties?

As to the second item or element, an adverse action is an action that is sufficiently severe to deter a person of ordinary firmness from continuing to engage in the exercise of conduct protected by the First Amendment.

To be sufficiently severe, the action need not be extreme or egregious, but it must be more than a trivial slight or inconvenience. Whether the Defendant's conduct constitutes adverse action is for you to decide.

As to the third element, it is not necessary that the Defendant specifically intended to violate the Plaintiff's First Amendment rights and the Plaintiff does not need to present proof of an unlawful motive, intent or design.

It is sufficient for the Plaintiff to show that the Defendant was aware that the Plaintiff had complained or threatened to complain about his use of religious references in the performance of his judicial duties and that the awareness was at least part of the Defendant's reason for taking the action, the adverse action as alleged.

As to the fourth element, a person acts under color of law when he uses or misuses authority that he has because of his official position.

As mentioned earlier, the -- as mentioned earlier, the parties have agreed that the Defendant Mark Somers acted under color of state law or custom and you may accept that fact as proven.

The Plaintiff is not required to produce direct proof of the Defendant's unlawful motive, intent or

design. A motive, intent or design to violate a person's constitutional rights, if it exists, is seldom admitted directly and may be shown from the existence of other facts.

In her third claim, the Plaintiff alleges that the Defendant violated Michigan's Civil Rights Act, because he did not hire her for the position of Court Administrator based on her gender.

That Michigan law prohibits an employer from discriminating against an employee based on religion, race, color, national origin, age, sex, height, weight, familial status or marital status.

To establish this claim, the Plaintiff has the burden of proof on the following elements:

First, that the Defendant took an adverse employment action against the Plaintiff.

And second, that the Plaintiff's sex was one of the motives that -- motives or reasons that made a difference in the Defendant's decision to take adverse action against the Plaintiff.

As to the first element, an adverse employment action is an action by the employer that constitutes a significant change in employment status, such as a hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a

conduct.

You should consider the following elements of damages: First, economic loss, consisting of the expenses reasonably incurred as a result of the Defendant's unlawful conduct, loss of salary and the value of employment benefits in the past and those reasonably certain to have been entitled to in the future, and any other economic loss.

And noneconomic loss, consisting of physical, mental and emotional suffering the Plaintiff has experienced and is reasonably certain to experience in the future, impairment of reputation, and personal humiliation.

Which, if any, of these elements of damages has been proved is for you to decide based upon the evidence and not upon speculation, guess or conjecture.

The amount of money to be awarded for certain of these elements cannot be proved in precise dollar amounts. The law leaves such amounts to your sound judgment. Your verdict must be solely to compensate the Plaintiff for her damages and not to punish the Defendant.

If you find in favor of the Plaintiff on her procedural due process violation claim, but the Defendant establishes by a preponderance of the evidence that he would have taken the same action to terminate the Plaintiff's employment even if proper procedures were followed, and the Defendant's action was lawful, then you must return a

verdict for the Plaintiff in the nominal amount of one dollar on the procedural due process claim.

If you find in favor of the Plaintiff on her procedural due process violation or her claim -- or her First Amendment retaliation claim, but you find that the Plaintiff's damages have no monetary value, then you must return a verdict for the Plaintiff in the nominal amount of one dollar.

The Plaintiff seeks recovery for the same injury in more than one of her claims against the Defendant. If you have occasion to consider damages against the Defendant under more than one of the Plaintiff's claims, you should not make a duplicate damages award for the same injury.

With respect to all three claims, if you find that the Plaintiff was injured as the result of the Defendant's unlawful conduct, you must -- you must determine whether the Plaintiff could have done something to lessen the harm she suffered.

The Defendant has the burden to prove by a preponderance of the evidence that the Plaintiff could have lessened or reduced the harm done to her and that the Plaintiff failed to do so.

If the Defendant establishes by a preponderance of the evidence that the Plaintiff could have reduced the harm done to herself, but failed to do so, the Plaintiff is

entitled only to damages sufficient to compensate for the injury that the Plaintiff would have suffered had the Plaintiff taken appropriate action to reduce the harm.

If you find that the Defendant Mark Somers is liable for violating the Plaintiff's right to procedural due process or retaliating against her for exercising her First Amendment rights, then you have the discretion to award punitive damages in addition to compensatory damages.

The purpose of punitive damages is to punish the Defendant for shocking conduct and to set an example to deter others for committing similar acts in the future.

You may award punitive damages only if you find that the Plaintiff has proved by a preponderance of the evidence that the Defendant intentionally engaged in the unlawful actions with malice or with reckless indifference to the Plaintiff's rights.

It is entirely within your discretion as jurors to determine whether to award punitive damages if the elements I just described have been proven. However, keep in mind that punitive damages are not required to be awarded.

Punitive damages are appropriate only for especially shocking and offensive misconduct. If you decide to award punitive damages, you must use your sound reason in setting the amount. It must not reflect bias, prejudice or sympathy toward any party, but the amount can be as large

as you believe necessary to fulfill the purpose of punitive damages.

That concludes the part of my instructions explaining the elements of the Plaintiff's claims. In the next session of court we will hear the arguments of the attorneys. We will conduct that proceeding tomorrow and we will begin in court at 8:00.

Please be here in time to -- so that we can begin the session promptly at 8:00 and we should have the case to you for your deliberations by about midmorning.

Even though the evidence has been received and I have given you preliminary instructions, you should not discuss the case among yourselves, and certainly, you should not discuss the case at home. You should keep your own counsel until it's time to deliberate in the jury room when you are together, all of you, as a jury.

You must also take special care to avoid any contact with any media source that might be reporting on the case.

You should also be sure not to conduct any independent research on your own, as I instructed you at the beginning of the trial. I know it's tempting with the -- in the era of social media and easy access to the internet to conduct that research on your own, and indeed, you may want to do that when the trial is over, but until you decide the

case, you must confine your knowledge of the events entirely to what you saw and heard here in court.

Until you have been discharged as a jury, you may not communicate with anyone or receive any communications about the facts of the case.

So, I thank you for your attention. I will see you tomorrow morning. Have a good evening.

Please, once again, leave your notes and also the instructions on the table in the jury room. If you want to write your name on your instructions, as you did with your notes, so you know whose is whose, that would be just fine.

Would you escort the jury out, please?

THE CLERK: All rise for the jury.

(Jury left courtroom at 4:06 p.m.)

THE COURT: Any objections to the questions -- to the instructions as delivered?

MR. SLAR: No, your Honor. Not by Plaintiff.

MR. KING: None by Defendant, your Honor.

THE COURT: The reason I ask is because occasionally I have been known to misspeak or not read them accurately, and if there is something that needs to be corrected, I would like you to bring that to my attention so we can take care of it.

MR. SLAR: Understood, your Honor.

THE COURT: See you tomorrow morning.

MR. SKLAR: Thank you very much.

THE COURT: Court is in recess.

(Proceedings adjourned at 4:08 p.m.)

* * *

CERTIFICATE OF COURT REPORTER

As an official court reporter for the United States District Court, appointed pursuant to provisions of Title 28, United States Code, Section 753, I do hereby certify the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

s/ Rene L. Twedt
RENE L. TWEDT, CSR, RMR, CRR
Federal Official Court Reporter